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6                   IN THE UNITED STATES DISTRICT COURT FOR THE  
7                   EASTERN DISTRICT OF CALIFORNIA

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9                   LAWRENCE ROBINSON,   )                   No. CV-F-02-5418 OWW  
10   )                   (No. CR-F-97-5129 OWW)  
11   )  
12   Petitioner,   )  
13   vs.   )  
14   )  
15   United States of America,   )  
16   )  
   Respondent.   )  
   )  
   )  
   )

17                   By Memorandum Decision and Order filed on October 23, 2007  
18 (Doc. 366), Petitioner's motion to vacate, set aside or correct  
19 sentence pursuant to 28 U.S.C. § 2255 was denied.

20                   On November 19, 2007, Petitioner filed a motion for leave to  
21 file two supplemental issues pursuant to Rule 15(c), Federal  
22 Rules of Civil Procedure. Petitioner contends that, on September  
23 1, 2007, he obtained a copy of the transcript of the change of  
24 plea proceedings on June 8, 2000 in *State of North Carolina v.*  
25 *Omar Lee August, File No. 98 CRS 38585*. Petitioner claims that  
this transcript established that government witness Omar August

1 lied during his testimony at trial and that the United States  
2 knowingly withheld material evidence or knowingly used or failed  
3 to correct the perjured testimony of Omar August.

4 Petitioner cannot rely on Rule 15(c), Federal Rules of Civil  
5 Procedure, to amend his Section 2255 motion to include the claims  
6 he seeks to assert. Petitioner's Section 2255 motion was timely  
7 filed on August 8, 2002.<sup>1</sup> Petitioner's Section 2255 motion  
8 contended he suffered (1) prosecutorial misconduct because the  
9 Government solicited false and misleading testimony before the  
10 Grand Jury resulting in the Indictment and (2) ineffective  
11 assistance of counsel during pre-trial, trial and appellate  
12 proceedings because defense counsel failed to "take appropriate  
13 steps necessary in objecting and filing suppression motions to  
14 preserve Petitioner's constitutional right to challenge federal  
15 jurisdiction under the Hobbs Act." As detailed in the  
16 Memorandum Decision and Order filed on October 23, 2007,  
17 Petitioner's claims were based on his contention that, because of  
18 evidence that Videotronics' business license had expired on March  
19 31, 1996, the business could not have been operating in  
20 interstate commerce.

21 In *Mayle v. Felix*, 545 U.S. 644 (2005), the Supreme Court  
22 held that the Ninth Circuit's understanding of the relation-back  
23 standard under Rule 15(c) which allowed an amendment to a habeas

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25 <sup>1</sup>By Order filed on September 6, 2006, Petitioner's motion was  
26 dismissed as untimely (Doc. 351). However, by Order filed on June  
12, 2007, Petitioner's motion to vacate the September 6, 2006 Order  
was granted (Doc. 362).

1 petition to "relate back" to the date of the original petition  
2 "so long as the new claim stems from the habeas petitioner's  
3 trial, conviction or sentence" was too broad. The Supreme Court  
4 held that an amended claim in a habeas petition relates back for  
5 statute of limitation purposes only if it shares a "common core  
6 of operative facts" with the original claim or claims.

7 There is no "common core of operative facts" between the  
8 claims alleged in the Petitioner's Section 2255 motion and the  
9 claims he seeks to add by amendment under Rule 15(c) based on his  
10 contention that Omar August lied at the time he testified in  
11 Petitioner's case that he did not expect any leniency in the  
12 North Carolina state court proceedings in return for his trial  
13 testimony and that the United States knowingly withheld material  
14 evidence and knowingly used or failed to correct August's  
15 perjured testimony.

16 By Memorandum Decision and Order filed on October 23, 2007  
17 (Doc. 366), Petitioner's motion to vacate, set aside or correct  
18 sentence pursuant to 28 U.S.C. § 2255 was denied. Petitioner  
19 could argue that the motion to amend arguably be deemed a motion  
20 for relief from judgment pursuant to Rule 60(b), Federal Rules of  
21 Civil Procedure. Even if so deemed, Petitioner would not be  
22 entitled to relief because Petitioner is attempting to file a  
23 second or successive petition and must first obtain authorization  
24 from the Ninth Circuit Court of Appeals to do so. In *Thompson v.*  
25 *Calderon*, 151 F.3d 918, 921 (9<sup>th</sup> Cir.), cert. denied, 524 U.S.  
26 965 (1998), the Ninth Circuit explained:

1       In most cases when the factual predicate for  
2       a Rule 60(b) motion also states a claim for a  
3       successive petition under 28 U.S.C. § 2244(b)  
4       ..., the Rule 60(b) motion should be treated  
5       as a successive habeas petition. This is  
6       consistent with general habeas corpus  
7       jurisprudence, for a 'Rule 60(b) motion  
8       following the entry of a final judgment in a  
9       habeas case raises policy concerns similar to  
10      those implicated by a second petition ....'  
11      ....

12     In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Supreme Court  
13    discussed the interaction between Rule 60(b), Federal Rules of  
14    Civil Procedure, and the AEDPA. After noting that the AEDPA and  
15    its decisions make clear that a "claim" "is an asserted federal  
16    basis for relief from a ... judgment of conviction", *id.* at 530,  
17    the Supreme Court stated:

18     In some instances, a Rule 60(b) motion will  
19    contain one or more 'claims.' For example,  
20    it might straightforwardly assert that owing  
21    to 'excusable neglect.' Fed. Rule Civ. Proc.  
22    60(b) (1), the movant's habeas petition had  
23    omitted a claim of constitutional error, and  
24    seek leave to present that claim ...  
25    Similarly, a motion might seek leave to  
26    present 'newly discovered evidence,' Fed.  
27    Rule Civ. Proc. 60(b) (2), in support of a  
28    claim previously denied ... Or a motion might  
29    contend that a subsequent change in  
30    substantive law is a 'reason justifying  
31    relief,' Fed. Rule Civ. Proc. 60(b) (6), from  
32    the previous denial of a claim ... Virtually  
33    every Court of Appeals to consider the  
34    question has held that such a pleading,  
35    although labeled a Rule 60(b) motion, is in  
36    substance a successive habeas petition and  
37    should be treated accordingly ....

38     We think those holdings are correct. A  
39    habeas petitioner's filing that seeks  
40    vindication of such a claim is, if not in  
41    substance a 'habeas corpus application,' at  
42    least similar enough that failing to subject  
43    it to the same requirements would be

1           'inconsistent with' the statute. 28 U.S.C. §  
2 2254 Rule 11. Using Rule 60(b) to present  
3 new claims for relief from a state court's  
4 judgment of conviction - even claims couched  
5 in the language of a true Rule 60(b) motion -  
6 circumvents AEDPA's requirement that a new  
7 claim be dismissed unless it relies on either  
8 a new rule of constitutional law or newly  
9 discovered facts. § 2244(b)(2). The same is  
10 true of a Rule 60(b)(2) motion presenting new  
11 evidence in support of a claim already  
12 litigated: even assuming that reliance on a  
13 new factual predicate causes that motion to  
14 escape § 2244(b)(1)'s prohibition of claims  
15 'presented in a prior application,' §  
16 2244(b)(2)(B) requires a more convincing  
17 factual showing than does Rule 60(b). Likewise,  
18 a Rule 60(b) motion based on a  
19 purported change in the substantive law  
20 governing the claim could be used to  
21 circumvent § 2244(b)(2)(A)'s dictate that the  
22 only new law on which a successive petition  
23 may rely is 'a new rule of constitutional  
24 law, made retroactive to cases on collateral  
review by the Supreme Court, that was  
previously unavailable.' In addition to the  
substantive conflict with AEDPA standards, in  
each of these three examples use of Rule  
60(b) would impermissibly circumvent the  
requirement that a successive habeas petition  
be precertified by the court of appeals as  
falling within an exception to the  
successive-petition bar. § 2244(b)(3).

25 In most cases, determining whether a Rule  
26 60(b) motion advances one or more 'claims'  
will be relatively simple. A motion that  
seeks to add a new ground for relief ... will  
of course qualify. A motion can also be said  
to bring a 'claim' if it attacks the federal  
court's previous resolution of a claim *on the  
merits*, since alleging that the court erred  
by denying habeas relief on the merits is  
effectively indistinguishable from alleging  
that the movant is, under the substantive  
provisions of the statutes, entitled to  
habeas relief.

25 *Id.* at 531-532. However, the Supreme Court ruled:

26 That is not the case ... when a Rule 60(b)

1 motion attacks, not the substance of the  
2 federal court's resolution of a claim on the  
3 merits, but some defect in the integrity of  
the federal habeas proceedings.

4 *Id.* at 532. The Supreme Court noted:

5 Fraud on the federal habeas court is one  
example of such a defect. See generally  
6 *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (CA2  
7 2001) (a witness's allegedly fraudulent basis  
for refusing to appear at a federal habeas  
hearing 'relate[d] to the integrity of the  
federal habeas proceeding, not to the  
integrity of the state criminal trial'). We  
note than an attack based on the movant's own  
conduct, or his habeas counsel's omissions,  
see, e.g., *supra*, at 530-531, ordinarily does  
not go to the integrity of the proceedings,  
but in effect asks for a second chance to  
have the merits determined favorably.

12 The claims Petitioner seeks to add by amendment do not implicate  
13 the integrity of the Section 2255 proceedings but, rather the  
14 integrity of the trial proceedings resulting in his conviction.  
15 Therefore, Petitioner is attempting to assert claims in a second  
16 or successive Section 2255 motion. This Court does not have  
17 jurisdiction to consider the claims unless and until Petitioner  
18 obtains authorization to file a second or successive Section 2255  
19 motion for the Ninth Circuit Court of Appeals. *United States v.*  
20 *Allen*, 157 F.3d 661, 664 (9<sup>th</sup> Cir. 1998). The alleged facts of  
21 whether a witness was provided leniency was covered extensively  
22 on cross-examination at trial. The witness August testified in  
23 Petitioner's trial on January 29, 1999. August was sentenced on  
24 June 8, 2000 in North Carolina. These alleged facts were easily  
25 ascertainable, but have not been timely asserted.

26 ACCORDINGLY, as set forth above, Petitioner Lawrence

1 Robinson's motion for leave to file two supplemental issues  
2 pursuant to Rule 15(c), Federal Rules of Civil Procedure is  
3 DENIED.

4 IT IS SO ORDERED.

5 Dated: December 5, 2007

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE

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